OFFICE OF THE MAYOR
ANTONIO R. VILLARAIGOSA

April 5, 2012

William Carter
Chief Deputy City Attorney
City Hall East
200 N. Main Street
Room 800
Los Angeles, CA 90012

Re: Release of Important Public Information Relating to Fire Department Response Times

Dear Bill:

The Mayor strongly believes that open government is good government. In particular, because the City provides services for benefit of the public, using public funds, our citizens and the media have a right to information that will let them assess what kind job we are doing. Unfortunately, however, your office has issued a series of opinions taking the contrary view about the public's right to detailed information relating to the Fire Department's incident response times. Your opinions make no mention of relevant legal authorities and discount the important public interest served by public disclosure. Worse, I have been told that your office has informed members of the Fire Department that they face potential criminal liability if they release this important information. This places both our firefighters and the public in an untenable position.

Earlier this week I told you that your office's opinions appeared insufficiently researched and reached the wrong conclusion. You said your office would not reverse its opinions, though I sensed you were nonetheless willing to consider authorities that contradicted them. They are discussed below. On behalf of the Mayor's Office, I am calling on you to reverse your opinions.

As you know, in recent weeks, legitimate concerns have been raised about the Fire Department's response times, and that department's reporting of response time data. As I am sure you understand, response time delays of even a few minutes sometimes can mean the difference of life or death for those needing fire, rescue, or Emergency Medical Services ("EMS") help. Given the importance of the services provided and the concerns raised about the Fire Department's response times, the public has a heightened interest in obtaining full and accurate information on the topic.

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Historically, the Fire Department has provided the public with detailed, real-time information about its dispatch of fire, life safety/rescue, and EMS vehicles and its incident response. Those who use scanners to monitor the Department's transmissions, or who follow the Department's alerts on its website or on Twitter, for example, have access to very detailed dispatch and response information. By letter dated March 19, 2012, however, Fire Chief Brian Cummings informed the Mayor that his department had discontinued its longstanding practice of releasing incident and response time information, based on oral advice from your office that release of this information violates the federal Health Insurance Portability and Accountability Act ("HIPAA") and the California Confidential Medical Information Act ("CMIA"). In response, by letter dated March 21, 2012, the Mayor directed Chief Cummings that in the absence of a written legal opinion from your office his department should resume full disclosure, noting that the Fire Department needs more transparency – not less.

Three week ago the Los Angeles Times requested information relating to Fire Department responses to emergency calls, including the address where each response was directed, and the administrative areas (first-in district, battalion, and division) where each incident occurred. Presumably the Times wants to see if *where* someone lives affects *how fast* help arrives. The Mayor believes members of the public have a right to know this information. But your office says they don't.

In a series of memoranda your office advised the Fire Department to withhold all information connected to the location of the incidents. You told the Fire Department to keep secret not only the address number, but also the street name and even the map page on which the location could be found.

Your advice is based on an analysis of the interplay between certain California and federal statutes. Subject to limited exceptions, the California Public Records Act ("CPRA") broadly requires the City of Los Angeles and other government entities to release their records to the public. HIPAA and CMIA prohibit the release of protected health information, subject to certain exceptions. You conclude that, when the question is *where* the Fire Department is delivering services, the public's right to know is trumped by the privacy provisions of these statutes.

Your written advice fails to discuss any relevant case or Attorney General opinion. I don't have to tell you that statutes are subject to interpretation. Judicial opinions, federal and state Attorney General opinions, legislative history, law review articles, and other authorities should be consulted for guidance on what statutes mean, how they interact with one another, and how they should be applied to a given set of facts. Your advice memoranda don't mention any of these authorities. Remarkably, your advice memoranda fail to cite even a single case or Attorney General opinion.

So I asked my staff to see if they could find any relevant authorities, and if so, what those authorities say. They did not find a single reported case or Attorney General opinion supporting your interpretation of the law. They did, however, find a number of authorities supporting the Mayor's view that information showing the location of Fire Department emergency services should be disclosed. This is because location information is not protected health information under HIPAA. Even if it were, however, it would still have to be released in order to comply with state public records access laws. HIPAA allows disclosure when required by law – including state public records laws. In other words, the public's right to know prevails.

Here are a few of these authorities:

- *State ex rel. Cincinnati Enquirer v. Daniels*, 108 Ohio St. 3d 518 (2006):

  A newspaper requested copies of the Cincinnati Health Department's lead-contamination citation reports that it had issued to hundreds of owners of housing reported to be the residences of children whose blood tests indicated elevated lead levels. The Ohio Supreme Court held that the reports were not covered by a HIPAA privacy rule. The Health Department was required to release the reports to the newspaper.

  The court first explained that the reports do not contain protected health information. "Nothing contained in these reports identifies by name, age, birth date, social security number, telephone number, family information, photograph, or other identifier any specific individual or details any specific medical examination, assessment, diagnosis, or treatment of any medical condition. There is a mere nondescript reference to 'a' child with 'an' elevated lead level." Id. at 522.

  Even if the reports did contain protected health information, the Court held that they were still subject to release under HIPAA's "required by law" exception. "[A]n entity like the Cincinnati Health Department, faced with an Ohio Public Records Act request, need determine only whether the requested disclosure is required by Ohio law to avoid violating HIPAA's privacy rule." Id. at 524 (internal quotation marks omitted).

- *Foley v. Samaritan Hospital*, 11 Misc. 3d 1055A; 815 N.Y.S.2d 494; 2006 N.Y. Misc. LEXIS 290; 2006 NY Slip. Op 50213U (2006):

  The plaintiff contended that the hospital's negligent conduct resulted in the death of a patient. The plaintiff wanted the hospital to release the names and addresses of the two other patients who were in the same room as the deceased in order to obtain information from them. The hospital refused. The court concluded that disclosing the names and addresses in response to a discovery request would not violate HIPAA because the disclosure would not reveal protected health information.

- *Abbott v. Texas Dept. of Mental Health*, 212 S.W.3d 648 (Tex. App. 2006):

  A reporter requested statistical information regarding allegations of abuse and investigations of abuse in Texas state facilities. The Texas Department of Mental Health and Mental Retardation believed the privacy provisions of HIPAA barred disclosure and asked the Texas Attorney General to issue an opinion confirming that. When the Attorney General opined instead that the information should be released, the department sued. The Texas Court of Appeal held that the department was required to release the information.

  The court first observed that "the information at issue in this case does not seem to be the type of information that would constitute 'protected health information.'" Id. at 655. The court went on to conclude that even if the information was considered protected health information, HIPAA's "required by law" exception applied. The Texas Public Information Act required that the information be released.

- *2007 Wisc. AG LEXIS 5,* No. I—03—07 (Wisconsin Attorney General, September 27, 2007):

  A newspaper reporter asked the fire department to provide access to records of an ambulance dispatched by the department. The department provided a redacted copy of the ambulance report. The redacted report disclosed the ambulance provider and EMTs involved, the date of the call, the dispatch and response times of the ambulance, the location to which the ambulance was dispatched, the ambulance units sent, and the other government agencies responding to the scene. The redacted report did not identify the name, age, and gender of the patient or the patient's condition and treatment. The fire department explained that it believed the redactions were required by HIPAA and state privacy law. The fire department also relied on the "strong public and legislative policy" reflected in those privacy laws. The department then concluded that the public's right of inspection of the information was outweighed by the overriding public interest in confidentiality.

  Approximately three weeks later the fire department supplemented its response because it had been advised that the United States Department of Health and Human Services ("HHS"), the federal agency that administers and enforces HIPAA, had opined that HIPAA allows the release of protected health information if that release is required under a public records law. The fire department concluded that Wisconsin had such a law and provided the newspaper reporter with a supplemental response that included the name, address, and age of the person to whom

> medical services were provided and the location to which the patient was transported.
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> The Wisconsin Attorney General agreed with HHS that the issue was governed by a Wisconsin public records law, not HIPAA.

There is an attorney general opinion from South Carolina that barred disclosure of EMS operations data, but it should not be used as a guide here. The South Carolina Attorney general observed that a South Carolina statute made information related to "emergency medical services" "strictly confidential." 2009 S.C. AG LEXIS 112, at *1. The attorney general interpreted the statute to bar release: "In the opinion of this office, the words in the statute 'data collected or prepared by or in connection with emergency medical services' protects all data, including response times, trip numbers, requests for helicopter transport by numbers and dates and other general raw data complied from day to day operations of our Emergency Services Department." Id. at *6. California has no such statute that specifically and completely prohibits the disclosure of data related to emergency medical services.

Not only did your written advice omit discussion of any relevant case or Attorney General opinion, your memoranda did not address HHS's views regarding the relationship between HIPAA and state public records laws. As you know, federal agency interpretations of the statutes they are charged to implement are often accorded deference by the courts. The HHS website has the following post, under the heading, "Frequently Asked Questions:"

> State public records laws, also known as open records or freedom of information laws, all provide for certain public access to government records. How does the HIPAA Privacy Rule relate to these state laws?
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> The Privacy Rule permits a covered entity [e.g., the Fire Department] to use and disclose protected health information as required by other law, including state law. Thus, where a state public records law mandates that a covered entity disclose protected health information, the covered entity is permitted by the Privacy Rule to make the disclosure, provided the disclosure complies with and is limited to the relevant requirements of the public records law.
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> * * *

Frequently Asked Questions, Health Information Policy, Office of Civil Rights, U.S. Department of Health and Human Services ("HHS") http://www.hhs.gov/ocr/privacy/hipaa/faq/disclosures_for_law_enforcement_purposes/506.html (last visited March 31, 2012) (internal citation omitted).

I have similar concerns about your office's analysis of California's counterpart to HIPAA, the California Confidential Medical Act ("CMIC"). You correctly pointed out that this statute similarly guards against disclosure of medical information. But you did not mention that, like HIPAA, it contains an exception for disclosures "required by law." Cal. Civil Code § 56.10(b)(9). This means that the CMIC likewise allows disclosures otherwise called for by California's public records law.

California's public records law strongly favors disclosure. As observed by the California Court of Appeal in *New York Times Co. v. Superior Court*, 218 Cal. App. 3d 1579 (1990), the California Constitution guarantees all persons the inalienable right to privacy. "Nonetheless, the public and the press have a right to review the government's conduct of its business. The Legislature, mindful of the right of individuals to privacy, has deemed the public's right of access to information concerning the conduct of public business a fundamental and necessary interest of citizenship." Id. at 1584 (internal citations omitted). "Consequently, in enacting the California Public Records Act, the Legislature balanced the individual's privacy interest with the right to know about the conduct of public business." Id. The specific exemptions from this general requirement of disclosure, which are listed in the Act, are "construed narrowly to ensure maximum disclosure of the conduct of governmental operations." Id. at 1585. "Thus the burden is on the agency to justify the need for non-disclosure." Id. In other words, disclosure is presumed to be appropriate.

The written advice prepared by your office also contained a number of inaccuracies regarding the identification of specific statutory and regulatory provisions. For example:

- "protected health information" is defined at 45 C.F.R. § 160.103, not at 45 C.F.R. § 164.501 as your advice memo states;
- "individually identifiable health information" is defined at 42 U.S.C. § 1320d(6), not at 45 C.F.R. § 164.508(a)(3) as your advice memo states; and
- the standards for de-identification of protected health information are found at 45 C.F.R. § 164.514(b), not at 45 C.F.R. § 164.512(b)(2)(i) as your advice memo states.

These mistakes suggest that your office failed to exercise the skill, prudence, and diligence required of attorneys when they are formulating advice.

In responding to inquiries regarding this matter, you have stated that the Fire Department and the Mayor are free to disregard the advice of your office. When asked by the news media about the application of medical privacy laws to Fire Department records, you were quoted as saying: "We don't give orders to the police chief, and we don't give orders to the fire chief. . . . The city attorney provides legal advice and recommendations to our client as with every other department. We don't make policy." http://egpnews.com/2012/03/council-members-skeptical-of-lafd-

information-policy/ (last visited March 31, 2012). While technically accurate, the comment ignores an important and disturbing additional fact. We have been told that your office has advised members of the Fire Department that if they fail to follow your advice, they may face criminal prosecution for violation of HIPAA. You have thus put these individuals and Fire Department management in an untenable position, facing a Hobson's choice of (1) following your unsubstantiated advice and denying the press and public access to important information or (2) providing the information to the public but fearing prosecution for doing so. Under these circumstances, the Mayor's Office cannot in good conscience direct our firefighters to disclose the information you have advised them to withhold.

We refuse, however, to let the City—and the public—be held hostage in this way. On behalf of the Mayor's Office, I am asking that you review the authorities cited and reverse your office's opinions. There appears to be no controlling state authority on point. This suggests that, at the end of the day, it may make more sense to have this issue resolved by a court. A ruling would remove the cloud that now hangs over public disclosure of public safety information once and for all. By copy of this letter I am asking the Los Angeles Times and any other media outlet to consider bringing a writ of mandate action in the Los Angeles Superior Court to compel disclosure of the information it seeks. The Mayor strongly believes that the public interest in disclosing the information sought by the Times far outweighs any public interest in non-disclosure. He believes that, given the authorities cited above, the Fire Department's long practice of public disclosure, and the public interest in access to information about government services, those who receive aid from the Fire Department have a diminished expectation of privacy about such things as where and when they received emergency public aid. The courts shall have the final word.

Very truly yours,

Brian Currey / GLOT

BRIAN CURREY
Counsel to the Mayor

BC: kr

cc: Karlene W. Goller, Esq, Deputy General Counsel, Los Angeles Times
Brian Cummings, Fire Chief